

ST 96-22

Tax Type: SALES TAX

Issue: Disallowed Resale Deduction (No Valid Certificates)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)

Docket No.

v.

TAXPAYER,

Taxpayer

)

IBT No.

)

NTL

)

Administrative Law Judge

)

Mary Gilhooly Japlon

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistants Attorney General Gary Stutland and James Dickett, on behalf of the Illinois Department of Revenue; ATTORNEY, Esq., on behalf of TAXPAYER.

Synopsis:

This matter comes on for hearing pursuant to the protest of TAXPAYER (hereinafter "taxpayer") of Notice of Tax Liability (hereinafter "NTL") No. XXXXX issued by the Department of Revenue (hereinafter "Department") on December 27, 1994, for Retailers' Occupation and related local taxes. At issue are sales of fencing materials to certain purchasers, whom the Department contends are construction contractors, upon which no tax was charged. Testifying at hearing were Revenue Auditor Celedonio James, on behalf of the Department of Revenue, and WITNESS A and WITNESS B, on behalf of TAXPAYER. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department of Revenue.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing for state ROT and penalty for the period of January 1988 through December 1989 in the amount of \$6,586.00. (Dept. Ex. No. 1; Tr. p. 11).

2. Also admitted into evidence to establish the Department's *prima facie* case was the Correction of Returns for municipal ROT and penalty in the amount of \$1,317.00 for the above-stated period. (Dept. Ex. No. 2; Tr. p. 11).

3. Also admitted into evidence to establish the Department's *prima facie* case was the Correction of Returns for RTA ROT and penalty in the amount of \$1,317.00 for the above-stated period. (Dept. Ex. No. 3; Tr. p. 11).

4. The taxable period at issue is January 1, 1988 through December 31, 1989. (Tr. p. 12).

5. The taxpayer manufactures fencing materials and sells the materials; no tax is charged upon the sale. (Tr. p. 17).

6. In the transactions at issue, none of the taxpayer's customers were registered to do business as a retailer with the Department of Revenue. (Tr. p. 16).

7. In the transactions at issue, none of the taxpayer's customers presented the taxpayer with resale certificates. (Tr. p. 21).

8. In an affidavit supplied by the taxpayer, a fence installer for two of taxpayer's customers attested that he "installed these materials at the customer's residences [sic]." (Tr. p. 28-29; Dept. Ex. No. 8).

Conclusions of Law:

Section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*) provides that in cases where there is a failure to file a return,

... the department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax due, as shown in such determination. (35 ILCS 120/5).

It is the taxpayer's burden to show by competent evidence that the returns corrected by the Department are not correct. Until the taxpayer presents such proof, the corrected returns are presumptively correct. The Department's *prima facie* is overcome, and the burden shifts to the Department to prove its case, when the taxpayer presents documentary evidence in the form of books and records. (Sprague v. Johnson, 195 Ill.App.3d 798 (1990), citing other cases). "Simply questioning the Department of Revenue's return or denying its accuracy does not shift the burden to the Department of Revenue." (Quincy Trading Post, Inc., v. Department of Revenue, 12 Ill.App.3d 725, 730-731 (1973)).

In the instant cause, the taxpayer asserts that its sales were for resale, and therefore, not taxable. The Department maintains that the taxpayer has failed to prove that the transactions at issue were for resale. Moreover, the Department contends that the issue herein does not involve resales, but rather sales by the taxpayer to construction contractors which are taxable at the time of sale pursuant to Ill. Admin. Code, Ch. I, sec. 130.2075. If the purchasing contractor is not certain how he will dispose of the property, he may certify to his vendor that he is buying all of such property for resale by furnishing his vendor with his ROT registration number in the Certificate of Resale. (Section 130.2075(b)(1),(b)(5)).

Regardless of whether the taxpayer sold to construction contractors or not, the taxpayer failed to present sufficient evidence to rebut the Department's *prima facie* case. The taxpayer contends that the transactions at issue constitute resales, yet has failed to produce resale certificates or other evidence of resale as provided by law. (35 ILCS 120/2c). The taxpayer argues that it is not able to obtain resale certificates from these purchasers who are not even registered with the Department. However, it is the vendor's responsibility to charge tax at the time of sale, unless the purchaser presents him with a resale certificate. Furthermore, the taxpayer offered into evidence a document in an attempt to support its resale argument in the form of "other evidence". The fact that these purchasers did not have a registration number is actually indicative of transactions that are not for resale.

Documentary evidence is lacking in this case. Testimony of the owner of the business is not in and of itself sufficient to shift the burden back to the Department. There must documentary corroboration of testimonial evidence in order for it to be probative. The *prima facie* case is rebutted when the taxpayer presents documentary evidence and testimony, "which is not so inconsistent or improbable itself as to be unworthy of belief." (Quincy Trading Post, Inc., 12 Ill.App.3d at 729-30).

Based upon the foregoing, it is my determination that the taxpayer has failed to rebut the Department's *prima facie* case. Accordingly, the NTL as issued must stand.

Recommendation:

Notice of Tax Liability No. XXXXX is affirmed in its entirety.

Enter:

Administrative Law Judge